



BOARD OF INQUIRY (*Human Rights Code*)

IN THE MATTER OF the Ontario Human Rights Code, R.S.O. 1990, c.H.19, as amended;

AND IN THE MATTER OF the amended complaint dated October 31, 1990, by Wendy Strauss
alleging discrimination in employment on the basis of sex, sexual harassment and sexual
solicitation by Canadian Property Investment Corporation CPI Limited, Paul MacInnis, Anil
Supersad and Brian Doyle.

B E T W E E N :

Wendy Strauss

Complainant

- and -

Canadian Property Investment Corporation

Paul MacInnis

Anil Supersad

Brian Doyle

Respondents

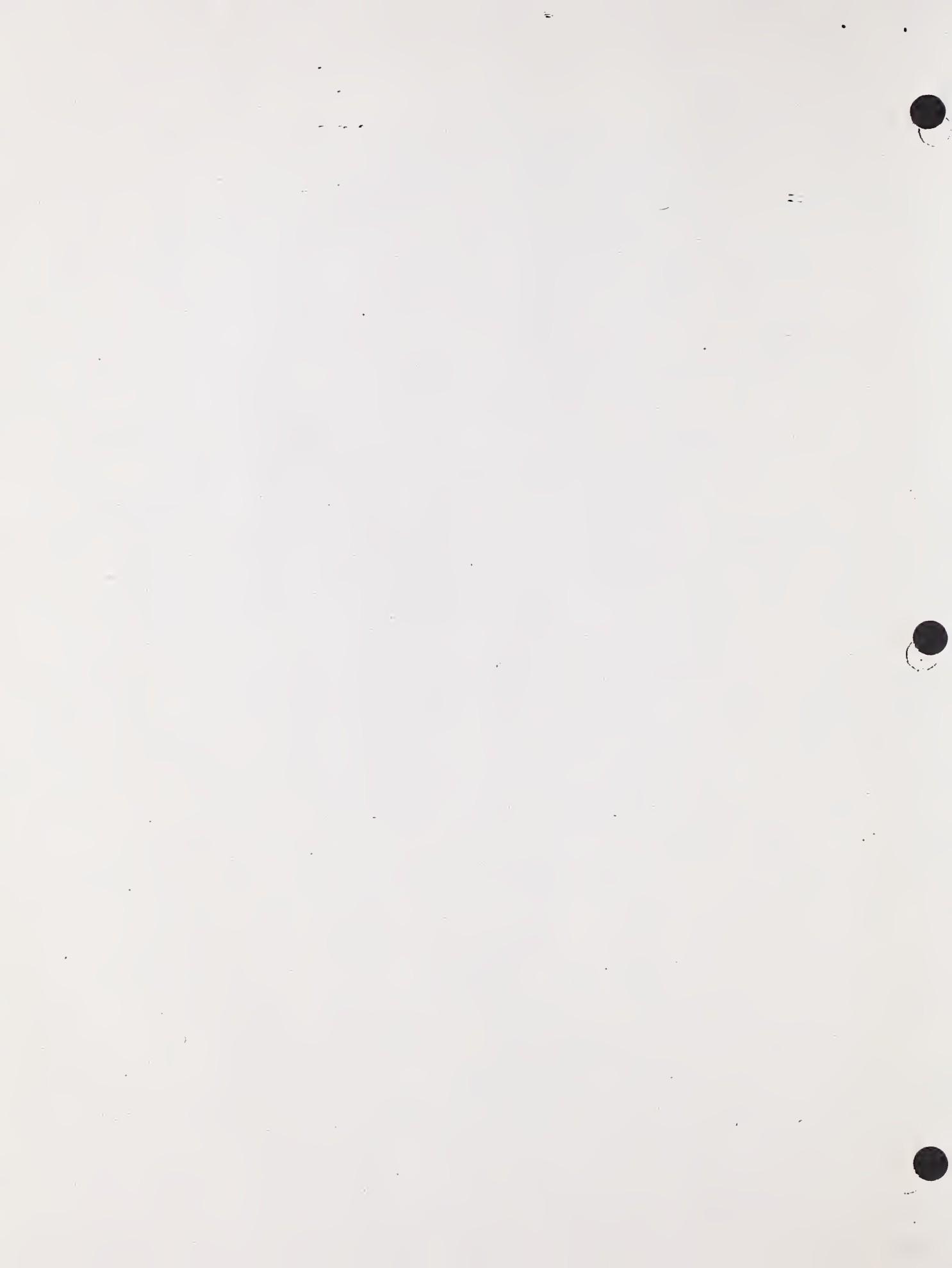
DECISION

Adjudicator : H.A. Bassford

Date : June 23, 1995

Board File No: 92-0223

Decision No : 95-025



IN THE MATTER OF the *HUMAN RIGHTS CODE*, R.S.O. 1990, c.H. 19, as amended;

AND IN THE MATTER OF the complaint dated October 31, 1990, by Wendy Strauss
alleging discrimination in employment on the basis of sex, sexual harassment and sexual
solicitation by Canadian Property Investment Corporation CPI Limited, Paul MacInnis,
Anil Supersad and Brian Doyle

BEFORE: H. A. Bassford
 Board of Inquiry

HEARINGS: Toronto, Ontario
 June 8, 1993, February 14, 16, 17, 18, May 6, 19, September 20, 26,
 November 22, 29, 1994

APPEARANCES: J. Scott
 Counsel for the Human Rights Commission

S. Shivarattan
Counsel for A. Supersad

DECISION

I was appointed as a board of inquiry by the Honourable Elaine Ziemba, Minister of Citizenship, on May 11, 1993, in order to hear the matter of a complaint dated October 31, 1990, by Ms. Wendy Strauss, alleging discrimination in employment on the basis of sex, sexual harassment, and sexual solicitation by Canadian Property Investment Corporation CPI Limited, Paul MacInnis, Anil Supersad and Brian Doyle. The hearing commenced by conference call on June 8, 1993. There were ten additional hearing days, commencing February 15, 1994 and ending November 29, 1994.

On February 14, Ms. Jennifer Scott, Counsel for the Human Rights Commission, informed the board that the Commission would not be proceeding against Mr. Brian Doyle, and that a settlement had been reached with Mr. Paul MacInnis. The hearing continued with Canadian Property Investment Corporation CPI Limited (henceforth CPI), and Anil Supersad as Respondents. Mr. Sudeesh Shivarattan appeared as counsel for Mr. Supersad. There was no appearance by CPI.

Testimony on the merits was suspended after a Notice of Constitutional Question was served by Mr. Shivarattan on April 12, 1994, alleging undue and unreasonable delay in proceeding with this inquiry. Arguments on this question were heard on May 6 and 19. The Board issued an Interim Decision which denied the motion on September 5, 1994.

Questions of Fact

Nature of Dispute

The business of CPI was to provide real estate investments through the vehicle of limited partnerships. There were two offices, in Ottawa and Toronto, with Ottawa being the head office. Mr. Supersad joined the firm as an account executive (which is a sales position) in late October or early November of 1989, and worked there until November of 1990. Ms. Strauss was hired by Mr. Paul MacInnis, the President of CPI, to be the office manager of the Toronto CPI office. She commenced work on April 9, 1990. Her employment was terminated on August 16, 1990.

The Commission contends that Mr. Supersad assumed the position of Director, Toronto Sales at the end of June, 1990, and that in this capacity he assumed authority over Ms. Strauss. The position of the Commission is that during this time Mr. Supersad engaged in a course of comment and conduct that constituted sexual harassment and sexual solicitation under the *Code*. The Commission further contends that in August of 1990 Mr. Supersad terminated the employment of Ms. Strauss.

The Respondent contends that Mr. Supersad did not formally assume the position of Director until August, 1990, that he had no authority over Ms. Strauss, and that he did not terminate her employment. The alleged course of conduct and comment did not occur.

Counsel agree that the law is clear and not in dispute. What is in dispute are the facts of the matter. And in order to decide these a judgement must be made about the credibility of Ms.

Strauss and Mr. Supersad. I shall first outline the differing versions of incidents as presented by Ms. Strauss and Mr. Supersad and then examine the other evidence and the internal consistency of each of their evidence to see which is the more plausible.

Version of Ms. Strauss

Ms. Strauss testified that her working relationship with Mr. Supersad was initially a good one, and that he was "a very friendly person". In May, 1990 Ms. Strauss was asked by Mr. MacInnis to make a sample sales presentation. She did so the next morning, but the presentation went very badly. Afterwards Mr. Supersad offered to help with the information so she could take an "investment approach" to sales presentations, which is what Mr. MacInnis desired. They met several times for this purpose, and she found the meetings quite helpful.

The relationship deteriorated in July, 1990. The primary cause was a series of incidents involving sexual comments and behaviour from Mr. Supersad. Ms. Strauss testified that the following took place. (1) In the first week of July Mr. Supersad came into Ms. Strauss' office, and stood beside her at her desk, partially leaning on it. While they were having a friendly conversation he leaned over, took her face in his hands, and kissed her, attempting to put his tongue in her mouth. She pulled back and told him this kind of behaviour was unacceptable to her. (2) During the first weeks of July he three times asked her what she was like in bed. He asked her this once in the office and twice in the food court of the building. (3) At the end of June or early July he said he saw lace under her blouse and asked her what she was wearing. (4) In July he said they would work well together as long as there was sexual tension between them. She laughed nervously and denied there was any sexual tension. (5) In early July Mr. Supersad talked to Ms. Strauss about an affair he had had with a blond German woman, and made reference to Ms. Strauss' blonde hair and name. She told him she was not German. (6) In late July he commented that if they couldn't sleep together and work together, then when was she leaving the company? Ms. Strauss did not respond.

A secondary cause of the deterioration of the relationship had to do with Mr. Supersad's apparently assuming control of the Toronto office of CPI. In July he asked her to type an organizational chart for the Toronto Marketing Division of CPI (Exhibit #7). This chart shows Mr. Supersad as Director/Toronto Sales and shows Ms. Strauss reporting to him as Manager, Administration. He told her that this was done because of changes to his position in the corporation arising from conversations with Mr. MacInnis and Mr. Ron Nash, the General Manager of CPI. Ms. Strauss did not discuss this apparent change in authority structure with respect to Mr. Supersad becoming her supervisor with Mr. MacInnis, Mr. Nash, or Mr. Supersad. At some point in July Mr. Supersad assumed Ms. Strauss' office, and moved her to the reception area. She did not protest this, since the other space was adequate for her to perform her administrative functions, but she did resent it.

During the latter part of her employment their relationship was strained, and they talked very little. Their communications were primarily through the intermediacy of Brian Doyle, whom she testified was a telemarketer employed by Mr. Supersad. On August 7, Mr. Doyle called Ms. Strauss into the back office, and told her that CPI was letting her go. When she asked why, he

stated that her work was unsatisfactory. She told him that the only people who could fire her were Paul MacInnis or Ron Nash, at which time Mr. Doyle terminated the interview.

Shortly afterwards Mr. Supersad called her into his office, in the presence of Mr. Doyle, and told her CPI was letting her go. When she asked why, he said it was for insubordination. As an example, he said she had refused to come into his office earlier that week when he requested it. Ms. Strauss informed Mr. Supersad that he was not in a position to terminate her employment, and that she would continue to do her work until she received notice from head office.

Ms. Strauss testified that there was one time when she had refused to meet with Mr. Supersad. In late July she had a problem with the word processor, and met in the food court with a person from a nearby office who had expertise, in order to discuss the problem. After twenty minutes Mr. Doyle came down and told her she was to get back to the office now on "Anil's [Mr. Supersad] orders." She came back up and heard Mr. Supersad yell at Mr. Doyle to "Tell Wendy [Ms. Strauss] to get into the office now," and pound his fist on the desk. Because he was angry and a volatile person, she did not meet with him, but went home at the end of the day.

Ms. Strauss contacted Mary Frances McKenna, the Office Administrator at the head office of CPI in Ottawa, and asked whether she was being terminated. Ms. McKenna said she had no knowledge of that, and suggested that Ms. Strauss contact Mr. Nash. During this conversation Ms. Strauss stated that conditions between her and Mr. Supersad had deteriorated. She told Ms. McKenna that he was volatile and difficult to work with, and told her of his sexual comments and his attempt to kiss her.

Ms. Strauss attempted to call Mr. Nash at his residence, because he was on vacation, but was unsuccessful in reaching him. Subsequent to her above discussion with Mr. Supersad, he told her that the termination papers were being prepared in the head office. She continued to attend at the office of CPI until August 17, 1990, on which day she received her record of employment and paycheques from the Ottawa office. At that time she left.

Version of Mr. Supersad

Mr. Supersad agreed that he had provided several training sessions to Ms. Strauss with respect to sales presentations. He said, however, that she had requested them from him. Mr. MacInnis had insisted she make a presentation, but she had managed to defer it for a few weeks. He met with her a number of times before she made the presentation to Mr. MacInnis. The presentation was made on June 4. Mr. Supersad did not regularly attend the office, but rather worked from home. On that day he had come to a meeting of the salespersons, and afterward had lunch with Mr. MacInnis and Mr. Nash. After lunch he went to the food court for a cigarette, and there talked with other members of the sales staff for a period of time. When he came up to the office, he knocked on Ms. Strauss' door to ask her how the sales presentation went. She was sobbing, and said to him, "It's all your fault. You didn't train me well enough." She said Mr. MacInnis was arrogant, and that he had stopped her within 30 seconds of her presentation. He talked to her for about a half an hour, until someone came in and told him Mr. MacInnis was ready to see him. At that time Ms. Strauss got up to wash her face, and Mr. Supersad gave her a

kiss on her forehead, between the ear and her hairline. The kiss had no sexual connotation, but was given to console a distraught fellow employee.

During lunch on that day Mr. Supersad was asked to consider taking over sales management of the office. On June 8 he went to Trinidad for ten days, and a few days after returning told Mr. Nash that he would take the position, but he would only deal with sales staff. "I told them I will take on just specifically sales recruitment, sales training and motivational sales staff, and I'll have nothing to do with anybody else -- anything else, anybody else, just sales staff, sales I want, and we discussed the commissions that I would want." (Transcript, v.7, p.90). During the month of July he came to the office more regularly, and began recruiting sales staff who would start in August, but he had other sales commitments and he did not formally take up the position until July 30, after which he was in the office every day.

Mr. Supersad's evidence was that he made none of the sexual comments Ms. Strauss attributed to him, nor did he attempt to kiss her as she described. He testified that the tension between them arose for different causes: Up until two days after he was coming into the office full-time, he and Ms. Strauss got along quite well. At this time she came into his office and told him that when she was recruited certain promises had been made to her about her salary, but she had not received the review or raise promised. She asked Mr. Supersad to intervene on her behalf. He told her he had no authority to do that, that he was just now starting in his position, and he would not get into conflict. Ms. Strauss told him that she was very upset at him for this and he would live to regret it.

A second incident occurred a few days later. He was in the food court (where they could smoke) with Brian Doyle discussing a register of Indo-Canadian businessmen. Ms. Strauss joined them, and asked why he was bothering with Indians, since they have no money. He tried to prove this statement erroneous, but she went on to make several racial comments, including calling him a "dirty Paki". Mr. Supersad was very offended by these comments, and instructed Brian Doyle to handle all interactions between Ms. Strauss and Mr. Supersad. From that time on there was very little communication between them.

On August 13 Brian Doyle communicated that he had received a letter from Ms. Strauss saying she was fearful of sexual harassment and didn't want to be in the office with Mr. Supersad unless someone else was present. He was shaken by this, and called Ron Nash. Brian Doyle went on the phone with Ron Nash and read the letter to him. Mr. Supersad indicated he would have no discussions with Wendy Strauss. After that call Mr. Supersad's wife called him and said that Wendy Strauss had called her to say she would "have" him for sexual harassment. He called Mr. Nash, who said he would talk to Paul MacInnis, and get back to him. Mr. Nash called back and asked if Mr. Supersad could work with Ms. Strauss. Mr. Supersad said that after the call to his wife and the accusation there was no way he wanted to work with Ms. Strauss. Mr. Nash said, "Well then, if you can't work together, you can't work together."

After this Mr. Nash spoke with Mr. Doyle. The decision to terminate Ms. Strauss was made by Mr. Nash and Mr. MacInnis. It was communicated to her by Mr. Doyle, and Mr. Supersad was not present at this time. Mr. Doyle was not acting as Mr. Supersad's agent, but as

an employee of CPI, and on the instructions of Mr. Nash. Mr. Supersad did not meet with Ms. Strauss as she stated, and did not tell her that she was being terminated. The only further meeting between them took place some days later, on August 16, when he informed her that her separation slip would be coming.

Office Management

Ms. Strauss and Mr. Supersad agree that their relationship was initially a good one, but disagree about when and why it deteriorated. Ms. Strauss says it started with the alleged incidents of July; Mr. Supersad says it started with the alleged incidents of August. They agree that Ms. Strauss was dismissed, but disagree as to how the dismissal took place and who was responsible for it. The putative incidents which involved sexual comment or touching or racial comments were matters about which there was no direct testimony from other witnesses. However, there was such testimony and other relevant evidence regarding Mr. Supersad's position as Director of Toronto Sales of CPI, and with respect to Ms. Strauss' termination. Accordingly, I shall determine those facts, and then turn to the other matters.

Appointment of Mr. Supersad as Sales Manager

As I noted above, Mr. Supersad testified that while he accepted the position of sales manager at the end of June, he did not take up his new position "officially" until August, and that he only attended the office on a regular basis from the last two days of July onward. He also testified, however, that during July he had discussions with many of the salespeople then working for CPI to see if they would make a full-time commitment to CPI, and that "basically they decided that they would just pass everything up" (Transcript, v.7, p.109). He also began recruiting other management staff, and in mid-July arranged for the employment of Mr. Brian Doyle to do telemarketing, telemarketing training and sales administration. This is confirmed by Mr. Supersad's testimony, by the memo concerning Mr. Doyle's hiring from Paul MacInnis (Exhibit 17) and by the interview notes with Mr. Doyle made by Mr. Richard Cushing, an investigator for the Human Rights Commission in this case (Exhibit # 14). Mr. Supersad also testified that by mid-July he had "taken over" the office previously used by Wendy Strauss, since it had always been the sales-manager's office (Transcript, v.7, p.112). Ms. Strauss then used a desk at the reception area of the office complex.

These facts make it clear that Mr. Supersad was functioning in many ways as the sales manager for CPI during July, even though he was not attending the office daily, and not overseeing a sales staff, since he had not then recruited them. No documents were tendered to show when the appointment was officially to start, and Mr. Supersad testified that arrangements were made through personal and telephone communications. Even though he may not have "officially" taken up the job, he was de facto performing as sales manager of CPI during the month of July, 1990.

Authority of Mr. Supersad

According to Mr. Supersad, his position as sales manager did not involve sales or office administration. In this capacity he did not have authority over Ms. Strauss. In his view he did not have the authority to fire Ms. Strauss, and did not do so. To some degree Ms. Strauss agreed with this position. She testified that when Mr. Supersad attempted to dismiss her (which he denied doing), she told him that he could not fire her, and that any dismissal would have to come from Mr. MacInnis or Mr. Nash. She further testified that she was never informed that Mr. Supersad had been named Sales Manager. When she typed a document which showed him as being in authority over her, she assumed that this was something which had been discussed between Mr. MacInnis, Mr. Nash and Mr. Supersad, but decided to take a "wait and see attitude" (Transcript, v. 1, p.29). In short, her actions suggested her acceptance that Mr. Supersad came to have some, but not complete, managerial authority over her.

Other evidence, however, suggests that Mr. Supersad did have considerable authority over sales and office administration. Mr. Nash testified that Mr. Supersad had been put in charge of the Toronto office by Mr. MacInnis in June or July, and that he would have had some degree of control over all the employees in the Toronto office, including Ms. Strauss. Mr. Nash also stated that it was not he who terminated or gave orders to terminate Ms. Strauss' employment. He stated that Mr. Supersad had telephoned and said he was having problems with Ms. Strauss. Mr. Nash offered the opinion, "...if you can't get on with people, then he [sic] should let them go." According to Mr. Nash, after speaking to him, Mr. Supersad did terminate Ms. Strauss' employment.

There is also documentary evidence which cannot be completely discounted. Exhibit #7 was tendered as an organization chart for the Toronto office of CPI. That document shows Mr. Supersad as reporting to Mr. Nash and Mr. MacInnis, and all of the other staff in Toronto, including Ms. Strauss, reporting to Mr. Supersad. According to Ms. Strauss' evidence it was prepared by Mr. Supersad early in July and typed by her. Mr. Supersad denied preparing the chart, and said he had never seen it before the present hearing. Mr. Nash was not familiar with the document, but recalled that at the time he was put in charge Mr. Supersad had spent some time organizing the office and had drawn something up.

By itself this evidence with respect to the chart is inconclusive. However, in cross-examination of Mr. Supersad, it became clear that several of the names on the chart were from Mr. Supersad's client list or were relatives of Mr. Supersad. Ms. Scott argued that this information could not have been known to others, and that it must be concluded that Mr. Supersad created or provided the information to have this chart created. Neither these facts nor this argument were disputed by Mr. Shivaratten. I am persuaded by Ms. Scott's argument, and conclude on balance that the chart was produced by Mr. Supersad. It cannot be concluded that it was ever an official working document of CPI, but it can be concluded that in Mr. Supersad's view, and in the view of CPI, he had greater authority over those in the Toronto office, including Ms. Strauss, than he indicated in his testimony.

Weight of Relevant Evidence

The next factual questions revolve around the process by which Ms. Strauss was dismissed. The evidence of Ms. McKenna, Mr. Nash and Mr. Doyle is relevant to resolving these questions. Mr. Shivarattan argued that the evidence of all three should be given little or no weight. I shall deal with this view before proceeding, beginning with Mr. Doyle.. Mr. Doyle was unable to be contacted, and did not testify at the hearing. Evidence from Mr. Doyle comes from telephone interview notes made by Mr. Richard Cushing, Investigating Officer for the Commission. Proceedings of boards of inquiry are conducted under the *Statutory Powers Procedure Act* which allows such evidence to be received and acted upon (s.15). However, Mr. Doyle's statements to Mr. Cushing were not made under oath or affirmation, and Mr. Doyle was not available for cross-examination. Because of this, his statements will be given significantly less weight than oral evidence which was given under oath or affirmation and which was subject to cross-examination.

Mr. Shivarattan argued that the evidence of both Ms. McKenna and Mr. Nash should be given little weight because they both exhibited lack of memory and were inconsistent individually and with each other. He also noted that they both demonstrated grievance against CPI.

In my review of the testimony given by Ms. McKenna and Mr. Nash, and of the sections referred to in argument, I did not find significant internal inconsistency. Each witness several times answered questions by saying that they could not remember. Such lack of memory is not surprising given their minimal everyday role with respect to the Toronto office of CPI and the passage of time. But this fact does not impugn their evidence with respect to those matters with which they were involved and about which they claimed good memory.

The matter of argued inconsistency between the two is as follows. Ms. McKenna confirmed that Ms. Strauss had informed her of Mr. Supersad's alleged sexual harassment, but could not recall whether it was in the same conversation as that in which Ms. Strauss called to ask whether she was being terminated. Ms. McKenna stated that she had relayed these allegations to Mr. Nash, and believed she did so before Ms. Strauss' employment was terminated. Mr. Nash adamantly stated that the first he knew of any allegations of sexual harassment was when he received the complaint from the Human Rights Commission, and that it was on that day that Ms. McKenna discussed Ms. Strauss' allegations to him. In my judgement this discrepancy is not one of significant proportion to impugn the testimony of either witness.

It is true that both Ms. McKenna and Mr. Nash evinced unhappiness with respect to CPI. But it is not at all clear to me why this should make their evidence doubtful. Neither witness is a respondent in this matter; neither appears to stand to lose or gain depending upon its outcome. They were both straight-forward in their statements about CPI, and did not in any way attempt to hide their feelings. On the whole I see no reason to think that the evidence of either witness should be given lesser weight than that of any other sworn witness. In my findings I shall give their statements full weight.

Dismissal of Ms. Strauss

Mr. Nash and Mr. Supersad agreed that they had had a telephone conversation with respect to problems Mr. Supersad was having with Ms. Strauss. Mr. Supersad testified that he told Mr. Nash about the allegations of sexual harassment, and about the racial comments Ms. Strauss directed to him. Mr. Nash did not recall any such comments. They agree that Mr. Nash made a comment to the effect that if people can't work together they should be let go. But at this point the two stories become very different.

On the one hand, Mr. Nash said that his statement was advice to Mr. Supersad. He did not himself terminate Ms. Strauss' appointment, did not direct Mr. Supersad to terminate her employment, and did not direct Mr. Doyle to terminate her appointment. On the other hand, Mr. Supersad testified that Mr. Nash took the decision to terminate Mr. Nash after consultation with Mr. MacInnis. This decision was communicated to Mr. Doyle, who in turn communicated it to Ms. Strauss.

Mr. Supersad said that he had no communication with Ms. Strauss at this time whatsoever. This differs materially from the events as recounted by Ms. Strauss. She held that Mr. Doyle had first informed her that she was dismissed, and that she told him he did not have that authority. She then went into Mr. Supersad's office with Mr. Doyle, and Mr. Supersad informed her that she was being dismissed for insubordination, and that she also told him that he did not have the authority to fire her. This is the sequence of events which Ms. McKenna testified was conveyed to her by Ms. Strauss when she phoned after being informed of her dismissal.

Mr. Doyle's account of the events is more consistent with those of Ms. Strauss and Mr. Nash than with the account of Mr. Supersad. According to his statement, he was told by Mr. Supersad that there had been consultation with the principals in Ottawa, and that Ms. Strauss was being dismissed. He does not refer to his first telling Ms. Strauss that she was being dismissed, but does say he did accompany her to Mr. Supersad's office, and that Mr. Supersad did there tell her she was being dismissed. Mr. Doyle said he himself intervened to try to act as a moderator and to "keep it civil".

Ms. Strauss' version of the firing incident is consistent with the other evidence presented, and Mr. Supersad's is not. On balance, therefore, I conclude that Mr. Supersad was personally involved in the dismissal of Ms. Strauss, both as to the decision to dismiss her and in the actual act of dismissal.

Sexual Comments and Behaviour

It is now appropriate to return to the alleged series of sexual comments and the alleged kiss. There was one incident of which Ms. Strauss said there was a witness. She testified that Brian Doyle was present in the food court during one of the incidents when Mr. Supersad asked her what she was like in bed. In his interview with Mr. Cushing, Mr. Doyle did not comment

about the alleged incident one way or another. He said most discussions were about business, and could not recall Mr. Supersad making comments on the figures or bodies of passing women. Mr. Cushing's interview notes are accordingly not of help with respect to Ms. Strauss' allegation.

The answer to the question then depends on the relative credibility of the Complainant and the Respondent. Overall, I believe Ms. Strauss to have been more credible. On the one hand, Ms. Strauss was subjected to a long, detailed cross-examination. It is my view that only some minor inconsistencies, primarily around dates, resulted from this examination. On the other hand, Mr. Supersad's testimony was wanting in respect to several important matters, in particular his assumption of the sales management position, his authority in that position, and his role in Ms. Strauss' dismissal.

There are two more reasons to give more credibility to Ms. Strauss' story. First, Mr. Supersad testified that two incidents occurred in early August which led to a deterioration of his relationship with Ms. Strauss: Ms. Strauss asked his help in getting a promised salary increase, which he declined to give, and she told him he would live to regret it; Ms. Strauss engaged in racial comments in early August, after which he did not want to meet with her. It is significant that these alleged comments, which provide an alternate explanation to the sexual incidents for the relationship deteriorating, were not mentioned during any of the investigation by the Commission, and that nothing was put to Ms. Strauss with respect to them during her cross-examination. Ms. Scott argued that adverse inference should be made from these facts, a conclusion with which I agree.

The evidence of Mr. William Gray is also significant here. Mr. Gray was employed as a telemarketer by Mr. John Demchuk, one of the salespeople at CPI. In this capacity he attended the offices at CPI. He recounted walking into Ms. Strauss' office one evening and seeing Ms. Strauss sitting behind her desk, while Mr. Supersad was sitting on the edge of the desk facing her. He did not see any touching, or the kiss which Ms. Strauss claimed to have occurred. But on a shared train ride with Ms. Strauss, which occurred from mid to late July, she told him that on the evening when he had walked into the office, Mr. Supersad had kissed her, sticking his tongue down her throat. Ms. Strauss was not happy about the occurrence.

The relevance of Mr. Gray's testimony to the present consideration is as follows. Mr. Supersad's recounting of the threat and the racist incident would account for the rift in the relationship, and allow an inference that the alleged series of sexual comments were invented as a way of getting even as Ms. Strauss supposedly had threatened to do. But Mr. Gray was told of the kiss well before these alleged incidents. Since there were no other reasons given for an earlier deterioration of the relationship of Ms. Strauss and Mr. Supersad, it would more than strain credulity to suggest believe that Ms. Strauss invented the kissing incident.

Given all of the above, it is more appropriate to accept Ms. Strauss' assertion of the occurrence of the incidents than to accept Mr. Supersad's denial. I accordingly hold that the series of sexual comments and the attempted kiss did occur.

Findings with Respect to Liability

Sexual Harassment

The *Human Rights Code* deals explicitly with sexual harassment in the workplace in section 7(2):

Every person who is an employee has a right to freedom from harassment in the workplace because of sex by his or her employer or agent of the employer or by another employee.

The concept of harassment is defined in section 10 (f) of the *Code*:

“harassment” means engaging in a course of vexatious comment or conduct that is known or ought reasonably to be known to be unwelcome.

The precise nature of these provisions is as delineated in *Cuff v. Gypsy Restaurant* (1987), 8 C.H.R.R. D/3927 (Ont. Bd. of Inq.). The word “course” entails that harassment will generally require more than one event. The comment or conduct must be subjectively annoying or distressing to the complainant. But the fact that a particular complainant found the comment or conduct vexatious is not sufficient, for it “must be known or ought reasonably to be known to be unwelcome.” While this objective standard is more likely to be satisfied if the complainant had clearly indicated to the respondent that the comment or conduct was unwelcome, this is not a necessary condition: “In general, the legislative enunciation of the right to be free from sexual harassment and advances indicates a public awareness of the unacceptable nature of this behaviour and carries with it an expectation that this understanding is shared by the members of the community.”

Now, the facts of the current case show that Mr. Supersad did engage in a series of eight incidents involving sexual comment or conduct. For example, he asked Ms. Strauss what she was like in bed, he referred to them working well together as long as there was sexual tension between them, he attempted to kiss her. It was clear from her testimony and the evidence of Mr. Gray that Ms. Strauss found this behaviour vexatious. In the cases of the kiss and the comment about sexual tension she communicated to Mr. Supersad that it was unwelcome. But in addition, the course of conduct in which Mr. Supersad engaged is one of a type which is publicly known to be unacceptable, and which Mr. Supersad ought reasonably to have known was unwelcome. Mr. Supersad was an employee of CPI during the time these events occurred, and in addition, in his capacity as sales manager, was an agent of the employer. Accordingly, I find that the facts satisfy the criteria of the *Code* with respect to sexual harassment, and that Mr. Supersad is in violation of this section of the *Code*.

Sexual Solicitation

Sexual Solicitation is treated separately from sexual harassment in the *Code* in section 7(3):

(3) Every person has a right to be free from,

- (a) a sexual solicitation or advance made by a person in a position to confer, grant or deny a benefit or advancement to the person where the person making the solicitation or advance knows or ought reasonably to know that it is unwelcome; or
- (b) a reprisal or a threat of reprisal for the rejection of a sexual solicitation or advance where the reprisal is made or threatened by a person in a position to confer, grant or deny a benefit or advancement to the person.

In his position of sales manager Mr. Supersad was in a position to grant or deny a benefit to Ms. Strauss. Indeed, in taking possession of what had been her office and in participating in her dismissal, he did so. The kiss described earlier was a sexual advance, and that incident meets the criteria of section 7 (3) (a). The comment made in late July that if they couldn't sleep together and work together when was Ms. Strauss leaving the company constitutes a threat of reprisal, and so meets the criteria of section 7 (3) (b). Accordingly, I hold that Mr. Supersad is in violation of section 7 (3) of the *Code*.

Discrimination on the Basis of Sex

Section 5 (1) of the *Act* reads as follows:

Every person has a right to equal treatment with respect to employment without discrimination because of race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sex, sexual orientation, age, record of offences, marital status, family status or handicap.

Ms. Scott submitted that the express provisions in the *Act* prohibiting sexual harassment and sexual solicitation have not replaced the prohibition against sex discrimination in employment. This reasoning has been followed in *Lee Ann Bruce and Darlene Jackson v. McGuire Truck Stop and Neil McGuire* (unreported, Ont. Bd. of Inq. decision, February 23, 1993), in which case the respondent was held to be in violation of sections 5(1), 7(2) and 7(3). This is consistent with *Janzen v. Platy Enterprise Ltd.* (1989), 10 C.H.R.R. D/6205 (S.C.C.), wherein the Supreme Court of Canada ruled that sexual harassment is sex discrimination. I accordingly believe that this section of the *Code* may be considered in the present case.

As is stated in *Ghosh v. Domglass* (1991), 17 C.H.R.R. D/216 (Ont. Bd. of Inq.),

It is now beyond question that the atmosphere in which an employee must work is a condition of his or her employment, and should that atmosphere be oppressive or "poisoned" for a minority group, that circumstance might amount to discrimination on a prohibited basis.

The decision in *McGuire Truck Stop* that section 5(1) applies is based upon the fact that the sexual harassment of the respondent created a poisoned work environment. Given these cases, and the judgement of the Supreme Court above, the question is whether the sexual harassment of Mr. Supersad created a poisoned work atmosphere.

There is no doubt that there was a poisoned atmosphere. Both Ms. Strauss and Mr. Supersad testified to the tensions and difficulties that existed between the two of them in the month of August. In my determination of the facts I concluded that Ms. Strauss' explanation of the deterioration of the work relationship was to be accepted in preference to that of Mr. Supersad. The conclusion is that the poisoned work environment was created by the sexual harassment . I therefore hold that Mr. Supersad is in violation of Section 5(1) of the *Act*.

Corporate Liability

The next question is whether CPI is liable. Section 45 (1) of the *Act* states,

For the purposes of this Act, except subsection 2(2), subsection 5(2), section 7 and subsection 44(1), any act or thing done or omitted to be done in the course of his or her employment by an officer, official, employee or agent of a corporation, trade union, trade or occupational association, unincorporated association or employers' organization shall be deemed to be an act or thing done or omitted to be done by the corporation, trade union, trade or occupational association, unincorporated association or employers' organization.

Mr. Supersad has been held to be in violation of sections 5(1), 7(2) and 7(3) of the *Act*. There is no deemed corporate liability pursuant to section 45(1) with respect to Mr. Supersad's violations of section 7, but for the violation of section 5(1), there is such liability.

While section 45(1) does not deem corporate liability with respect to violations of section 7, it does not exclude such liability. Several decisions have held that there will be corporate liability if the harassing employee is part of the 'directing mind' of the corporation [*Wei Fu v. Ontario Government Protection Service* (1985, 6 C.H.R.R. D/2797 (Ont. Bd. of Inq.), *Shaw v. Levac Supply Ltd.* (1991), 14 C.H.R.R. D/36 (Ont. Bd. of Inq.), *Lampman v. Photoflair Ltd.* (unreported Ont. Bd. of Inq. decision dated Sept. 28, 1992)]. In *Fu* Professor Cumming stated a number of situations in which the corporate entity would be in breach of the *Code*, including the one relevant here (at para 22922):

Where the employer is a corporate entity, and an employee is in contravention of the *Code*, and that employee is part of the 'directing mind' of the corporation, then the employer corporation is itself personally in contravention. The act of the employee becomes the act of the corporate entity itself, in accordance with the organic theory of corporate responsibility. ...

Generally speaking, whenever an employee provides some function of management, he is

then part of the 'directing mind': Once an employee is part of the directing mind, and the contravention of the *Code* comes in his performing his corporate function, the corporation is itself also personally in breach of the *Code*.

In the present case, Mr. Supersad was performing management functions at the time that the breach of the *Code* occurred. Accordingly, Canadian Property Investment Corporation CPI Limited is in breach of sections 7(2) and 7(3) of the *Code* as well as being in breach of section 5(1).

Remedy

The Commission has asked the board to order both special and general damages in order to compensate the Complainant for the loss of income arising from her dismissal and for the loss of dignity and self respect arising from the infringement, as well as for the loss suffered from the infringement of the right of equality itself. The awarding of damages falls under Section 41(1) of the *Code*, which is as follows.

Where the board of inquiry, after a hearing, finds that a right of the complainant under Part I has been infringed and that the infringement is a contravention of section 9 by a party to the proceeding, the board may, by order,

- (a) direct the party to do anything that, in the opinion of the board, the party ought to do to achieve compliance with this Act, both in respect of the complaint and in respect of future practices; and
- (b) direct the party to make restitution, including monetary compensation, for loss arising out of the infringement, and where the infringement has been engaged in willfully or recklessly, monetary compensation may include an award, not exceeding \$10,000, for mental anguish.

It is now generally accepted that there is a presumption in favour of awarding both special and general damages, and that they should provide true compensation [*Cameron v. Nel-Gor Castle Nursing Home*, (1984) 5 C.H.R.R. D/2170 (Ont. Bd. Inq.)]. The standard for the awarding of special monetary damages due to loss of employment arising from the discriminatory conduct is what a complainant would have earned had he or she not been denied the employment opportunity [*Cameron, supra.*; *Piazza v. Airport Taxicab (Milton) Assn.* (1989), 69 O.R. (2d) 281 (C.A.)]. In awarding general damages it is accepted that loss of dignity and self respect, as well as loss of the loss of the human right of equality itself, are relevant components of the award [*Cameron, supra.*]. Given this, it can be concluded that the Commission's request falls within the ambit of the board.

The facts of the case made it clear that one of the losses incurred was that of Ms. Strauss' employment. Ms. Strauss made every attempt to mitigate the loss of employment income, and achieved a new employment situation approximately three weeks after being dismissed. Given this, I hold that restitution in the form of monetary compensation should be made for loss of

income. The loss is that of three weeks income, which I calculate in the amount of \$1,557.70. Prejudgement interest is to be calculated pursuant to the *Courts of Justice Act*, in the amount of \$918.87.

The generally accepted factors relevant to awards for general damages were set out by Professor Cumming in *Torres v. Royalty Kitchenware Ltd.* (1982), 3 C.H.R.R. D/858 (Ont. Bd. Inq.).

- (a) The nature of the harassment, that is, was it simply verbal or was it physical as well?
- (b) The degree of aggressiveness and physical contact in the harassment.
- (c) The ongoing nature, that is, the time period of the harassment.
- (d) The frequency of the harassment.
- (e) The age of the victim.
- (f) The vulnerability of the victim.
- (g) The psychological impact of the harassment upon the victim.

In the current case the harassment was physical as well as verbal. In the case of the kiss there was a significant degree of aggressiveness and physical contact. The harassment went on for a period in excess of a month, and involved at least eight separate incidents. Ms. Strauss was not vulnerable because of young age, but was under the management of Mr. Supersad, so was vulnerable. It is clear that many of the relevant criteria were met and that Ms. Strauss has suffered loss of dignity and self-respect, as well as the loss suffered for the infringement of the right of equality itself. I accordingly award \$2000.00 general damages for loss arising from the infringement. Pre-judgement interest calculated in accordance with the *Courts of Justice Act* is in the amount of \$1190.45.

Finally, there was significant psychological impact of long-standing result, as was indicated by Ms. Strauss' submission respecting damages. There she said she has spent many painful hours recalling the incidents, now has great difficulty trusting people, and finds herself "adopting negative and untrustworthy thoughts towards employers and co-workers" (Transcript, v. 10, p.19). On the facts, Mr. Supersad engaged in the infringement willfully and recklessly. It is accordingly within the ambit of the board to make an award for mental anguish, and I think it appropriate to do so. I award \$2000.00 for mental anguish. Pre-judgement interest, calculated as above, is in the amount of \$1190.45.

Order

This board of inquiry having found the Respondent Anil Supersad and the Respondent Canadian Property Investment Corporation CPI Limited to have committed certain breaches of sections 5(1), 7(2) and 7(3) of the *Human Rights Code* hereby orders the following:

The Respondents are jointly and severally liable to pay forthwith to the Complainant as follows:

- (a) as damages for lost wages the sum of \$1,5576.70;
- (b) as general damages, the sum of \$2000.00;
- (c) as award for mental anguish, the sum of \$2000.00;
- (d) pre-judgement interest with respect to the said sums, in the amount of \$3299.77.

This board of inquiry shall retain jurisdiction for the purpose of resolving any difficulties the parties might experience in implementing this order.

Dated at Toronto this 23rd day of June, 1995.

H.A. Bassford
Board of Inquiry

Order

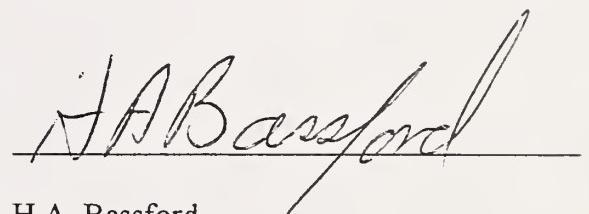
This board of inquiry having found the Respondent Anil Supersad and the Respondent Canadian Property Investment Corporation CPI Limited to have committed certain breaches of sections 5(1), 7(2) and 7(3) of the ***Human Rights Code*** hereby orders the following:

The Respondents are jointly and severally liable to pay forthwith to the Complainant as follows:

- (a) as damages for lost wages the sum of \$1,557.70;
- (b) as general damages, the sum of \$2,000.00;
- (c) as award for mental anguish, the sum of \$2,000.00;
- (d) pre-judgement interest with respect to the said sums, in the amount of \$3,299.77.

This board of inquiry shall retain jurisdiction for the purpose of resolving any difficulties the parties might experience in implementing this order.

Corrected page dated at Toronto this 29 day of *October, 1995,*



H.A. Bassford

H.A. Bassford
Board of Inquiry

